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No. 69-5001

No. 499-Misc.

In the

Supreme Court of the United States

OCTOBER TERM, 1969

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

MOTION OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF AMICI CURIAE.

ELMER GERTZ
120 S. La Salle St.
Chicago, Ill. 60603

WILLARD J. LASSERS
11 S. La Salle St.
Chicago, Ill. 60603
Attorneys for Amici Curiae

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American Civil Liberties Union, Illinois Division, and Illinois Committee for Abolition of Capital Punishment move the Court for leave to appear as *Amici Curiae* in this case and to file a brief in support of the petitioner. Petitioner has consented to the filing of this brief.

American Civil Liberties Union, an organization devoted to the preservation of a free and open society, principally through the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States, has taken the position that capital punishment is inherently and increasingly a civil liberties issue. The Illinois Division has been especially active in the judicial struggle against the death penalty.

Illinois Committee to Abolish Capital Punishment joins with the American Civil Liberties Union, Illinois Divi-

sion, in this application. This Committee numbers in its membership leading citizens of the State of Illinois, of all religious faiths and professional, social and economic levels. It has been active in its field for several years and is familiar with the problems involved herein. Counsel for the movants are members of the Committee.

As we have heretofore said, capital punishment must be examined, not as if it were one among many punishments society chooses to impose upon its offenders, but one awful in contemplation and irrevocable in result. The issues must be considered in light of the fact that the death penalty is withering away everywhere. The dramatic decline is shown by the fact that in 1968 and thus far in 1969 there was not one execution in the entire country; in 1967, there were two executions, and in 1966 one. A substantial and growing segment of all Americans, probably a majority, is opposed to the death penalty. Yet, about 500 persons are now under sentence of death. Recently, this Court, in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), held that prospective jurors could not be disqualified from the jury simply because they have scruples against the death penalty. The court below, and courts throughout the country, have evaded the holding of this Court. These facts create a moral and constitutional dilemma that must be confronted and resolved by this Court. Hence the importance of granting certiorari herein and allowing the filing of *amici's* brief.

Respectfully submitted,

ELMER GERTZ
120 South LaSalle Street
Chicago, Illinois 60603

WILLARD J. LASSERS
11 South LaSalle Street
Chicago, Illinois 60603

BRIEF OF AMICI CURIAE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Amici curiae, Illinois Division, American Civil Liberties Union, and Illinois Committee for the Abolition of Capital Punishment, file this brief in support of the petition for a writ of certiorari.

There are two compelling reasons for the grant of review in this case. One ground (see Part I below) is that it has become painfully apparent that the Illinois courts, as well as other courts throughout the nation, are attempting to nullify the holding of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), ruling that jurors may not be challenged for cause simply because they have scruples against the death penalty.

The other ground (see Part II below) is that the Illinois courts still do not understand that the prosecution may not withhold evidence favorable to the accused. In the case at bar such evidence was withheld, the defendant convicted and sentenced to death. There is substantial doubt as to the guilt of the accused.

I.

Certiorari Should Be Granted to Halt Wholesale Evasions of the Constitutional Protections Established by Witherspoon.

1. Witherspoon evasions by the Supreme Court of Illinois.

In our amicus brief in this case we consider together the holdings of the Supreme Court of Illinois in *Moore*, (the case at bar) *Speck* (now pending here on certiorari,

Misc. No. .....) and *People* v. *Mallette*.[1] In *Moore*, the Court below attempted to distinguish *Witherspoon* on the ground that in *Witherspoon* the trial court had simply acted hastily, whereas no such haste was displayed in *Moore*. *Witherspoon*, however, stands for a much broader principle—for the principle that a prospective juror cannot be disqualified simply because of scruples against the death penalty. Yet that is exactly what has occurred here.

In *Moore* eight veniremen out of 48 were excluded simply because of scruples. (For the Court's convenience we reproduce here the chart from our *amicus* brief in *Speck*, see pp. 5-6)

[1] For the cases below, see *People* v. *Speck*, 41 Ill. 2d 177, 242 NE 2d 208 (1968); *People* v. *Mallette*, ... Ill. 2d ....., 244 NE 2d 129 (1969); and *People* v. *Moore*, 42 Ill. 2d 173, 246 NE 2d 299 (1969).

Veniremen Excused	SPECK VOIR DIRE		MOORE VOIR DIRE		MALLETT VOIR DIRE	
	No.	Pct.	No.	Pct.	No.	Pct.
Hardship or by Agreement	32	5	1	2	2	2
Peremptory Challenges						
State	81	14	17	35	12	14
Defense	81	14	5	11	20	24
	162	28	22	46	32	38
"Scruples" without more expressed by venireman	57	10	8	17	22	25
"Scrupled" but would not inflict death	4	0	4	8	1	1
Not "scrupled" but would not inflict death	20	3	0	0	15	17
"Couldn't be fair"	320	53	1	2	3	3
Total Excused	595	99	36	75	75	86

	SPICE VOIR DIRE		MOORE VOIR DIRE		MALLETT VOIR DIRE	
	No.	Pct.	No.	Pct.	No.	Pct.
Veniremen Excused (total brought forward)	595	99	36	75	75	86
Veniremen Accepted			12	25	12	14
Jurors	12	1				
Alternate Jurors	2	0*				
Total Venire	609	100%	48	100%	87	100%

* Less than .5%

A few examples:

Mary Gorski, prospective juror:

"Q. Do you know of any reason why you cannot be a fair and impartial juror in this case? (R 350)

"A. No, sir.

"Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

"A. Yes, I do, your Honor.

"The Court: All right, step down."

Anna L. Hohnwald, prospective juror:

"Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

"A. No, sir.

"Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

"A. Yes, I do.

"The Court: Step down, please."

The court below advanced also the contention that the prosecution could have removed *Witherspoon* qualified jurors by using peremptory challenges. This is simply not true. The State used 17 of 20 peremptory challenges. It could not have removed more than three of the eight scrupled veniremen.

In our *Speck* amicus brief, we discuss at greater length our contentions on this point. Since we have considered the *Moore, Speck* and *Mallette* cases in that brief we ask the Court to refer to it.

2. Wholesale Witherspoon evasion by other state courts

Were it only the Supreme Court of Illinois which has sought to evade the ruling of this Court in *Witherspoon, amici* would conclude that it is simply a case of a single

Court reluctant to accept this Court's rulings, understandable since it is their ruling in that case which had been overridden. A study of the cases across the country since *Witherspoon* indicates, however, broad refusal to give effect to that decision.

In at least twenty cases in fifteen different states, the clear mandate of this Court in *Witherspoon* has been either ignored or evaded. The cases are collected in petitioner's supplemental brief in *Maxwell* v. *Bishop*, October Term 1969, No. 13 at pp. 8a-18a. It is quite clear that only California and Georgia are complying generally with *Witherspoon*. Almost all other courts which have passed on *Witherspoon* issues have found reasons for declining to set aside death sentences. Only by granting *certiorari* in this and similar cases will this deplorable situation be remedied.

Let us mention a few typical patterns of avoidance:

In one case (*Davis* v. *State*, 440 S.W. 2d 244 (Ark. 1969)), the court flatly refused to follow *Witherspoon*, stating that the jury box is not the proper place for considering attitudes on capital punishment.

Perhaps the most common single excuse given for not applying *Witherspoon* "strictly" was that the trial court, while violating the letter of that ruling, had complied with its spirit. In *Bell* v. *Patterson*, 402 F.2d 394 (10th Cir. 1968) the Court held that excluding two jurors improperly was not sufficient reason to reverse, since the state had not "crossed the line of neutrality." A similar holding is *State ex rel. Brent* v. *White* (No. 47,265, Crim. Div., 19th Judicial District Court, East Baton Rouge Parish, La., July 31, 1969) that since the prosecution had also excused jurors with scruples against life imprison-

ment, the jury was neutral and *Witherspoon* does not apply.

In *State* v. *Mathis*, 52 N.J. 238, 245 A.2d 20 (1968) the Court held that it is not the number of scrupled jurors who are excused, but "whether the totality of the trial court's treatment of the subject operated to deprive the defendant of an opportunity for a jury of a representative quality." And in both *Commonwealth* v. *Rightnour*, 253 A. 2d 644 (Pa. 1969) and *State* v. *Aiken & Wheat*, 452 P.2d 232 (Wash. 1969) it was held that the trial court has a broad discretion and since he has seen and heard the jurors the reviewing court will not reverse in the absence of a clear abuse of discretion.

In *Jaggers* v. *Commonwealth*, 439 SW 2d 580 (Ky. 1968) the court cited *People* v. *Speck*, 41 Ill. 2d 177 (1969) for the proposition that it is the "atmosphere of the proceeding" that counts.

It is next to impossible for an appellate court to reconstruct the "atmosphere" of a courtroom where a defendant is on trial for his life from a cold written record. From afar it is impossible to tell whether the "atmosphere" was fair or unfair. To state that the defendant has had an opportunity to obtain a constitutionally required jury from a remote reconstruction of the atmosphere surrounding the selection of those jurors is to evade the duty to uphold our constitution. The rule laid down by this Court in *Witherspoon* is clear. No juror may be excused by the State on the ground that he has some scruples against the death penalty. *No* juror. There is absolutely no reason to allow this mandate to be avoided. There is no rule of *de minimus* where constitutional rights are at stake. Only by granting certiorari in cases such as this will this Court make that principle clear.

Another ground often cited is failure of defense counsel to make proper objection below. In this category fall the cases of *State* v. *Peele*, 274 N.C. 106, 161 SE 2d 568 (1968); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 NE 2d 607 (1969); *Pittman* v. *State*, 434 SW 2d 352 (Tex. Crim. App. 1968); and *Scott* v. *State*, 434 SW 2d 678 (Tex. Crim. App. 1968).

In several other cases, the courts are vague and confusing in their reasoning. Indeed all that can be said about these opinions is that they all indicate a deliberate attempt to evade *Witherspoon*, but in none of these cases is there an adequate explanation of why the *Witherspoon* standards were not violated. In some of these cases it is difficult to tell whether *Witherspoon* was violated or not as the opinions do not contain enough information upon which to base a reliable opinion. Into this category fall the following cases: *Wilson* v. *State*, No. 36,677, (Fla., July 9, 1969); *State* v. *Crook*, 221 So. 2d 473 (La. 1969); *Curtis* v. *State*, 4 Md. App. 499, 243 A.2d 656 (1968); *Duisen* v. *State*, 441 SW 2d 688 (Mo. 1969); and *Koonce* v. *State*, No. A-14,826 (Okla. Crim. App. May 21, 1969).

In short, this Court's decision in *Witherspoon* is being followed sporadically at best. Of greatest importance is that every one of these cases involves the death penalty. Where a defendant is faced with the loss of his life, the prosecution and judiciary should lean over backward to make sure that he is assured all of the protections of the law. Instead, many courts are engaging in judicial nit-picking in a clear attempt to evade the law of the land as announced by this Court.

This Court should grant *certiorari* in this case to assure that *Witherspoon* will not be stillborn. There is no point in proclaiming a constitutional principle if it is to become

rhetoric rather than reality. We must make certain that there is no vitiation of a constitutional right where the penalty which faces the defendant is irrevocable.

II.

Certiorari Should Be Granted To Reaffirm the Principle That A Conviction May Not Stand Where it was Procured by Deliberate Suppression of Evidence By the Prosecution.

Subsequent to petitioner's conviction, his attorneys discovered that vital evidence known to the prosecution had been deliberately and knowingly suppressed in a brazen and deliberate plan to insure that petitioner would be convicted when there was very real and substantial evidence that he had not in fact committed the crime with which he was charged.

On April 25, 1962, an unruly customer was thrown out of a Lansing, Ill. bar by the bartender, Zitek. A short while later this customer returned and shot the bartender in the heart with a twelve-gauge shotgun. The prosecution's case against petitioner was based upon: 1) the testimony of a waitress, Patricia Hill, that petitioner was the customer who had killed the bartender; 2) the testimony of a patron, Henley Powell, that petitioner was the customer who had killed the bartender; and 3) the testimony of Virgle Sanders that petitioner was a man known as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing.

Subsequent to petitioner's conviction several facts were discovered which cast great doubt upon these identifications; these facts were known to the prosecution at the trial but not revealed to the defense.

1. Virgle Sanders had given a written statement to the Lansing police stating that he had met "Slick" in a

tavern *at a time when petitioner was incarcerated in a federal penitentiary.* When confronted with this information at the post-conviction hearing, Sanders admitted that it was impossible that petitioner was the person he knew as "Slick."

2. When Sanders first saw petitioner at the trial twenty-five months after "Slick" had bragged of killing the bartender, he told the Lansing Police, in the presence of the prosecutors that "Slick" was 30 or 40 pounds heavier than petitioner.

3. After obtaining Sanders' written statement, the Lansing police raided the tavern in which Sanders had met Slick, at which time the owner, Delbert Jones told them that he knew and could identify "Slick." When petitioner was arrested, the police did not contact Jones for the purpose of identifying petitioner.

4. One William Leon Thompson, who knew both Delbert Jones and Virgle Sanders, told police that he knew and could identify "Slick", but when shown a photograph of petitioner he told police that petitioner did not resemble "Slick."

5. The Lansing Police drew a diagram of the murder scene which showed that the prosecution witness Henley Powell was not telling the truth when he stated at the trial that he was facing the entrance of the tavern through which the killer entered.

Each and every one of these extremely crucial pieces of evidence were concealed from petitioner and his attorneys, either by the prosecution, the Lansing police or both. Six months prior to the trial petitioner, through his attorneys, filed a motion demanding a copy of the grand jury minutes and any and all written statements in the possession of

the Lansing Police taken from any witnesses. This request was denied on the ground that these statements would be given to petitioner's counsel at such time as these witnesses testified at the trial. The statement of Virgle Sanders was not shown to petitioner's counsel at this time.

There is no question that this vital information was deliberately suppressed by the prosecution. The prosecution had a suspect. It was determined to secure a conviction and any evidence which was inconsistent with petitioner's conviction was not only ignored but suppressed. This Court has gone on record time and time again condemning in the strongest possible terms such subterfuge and dishonesty on the part of the prosecution. Most recently in *Miller* v. *Pate*, 386 U.S. 1, 7 (1967) this Court said:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. . . . There has been no deviation from that established principle. . . . There can be no retreat from that principle here."

This Court must stand ready to protect the rights of those, like petitioner here, who have been unfairly convicted based on evidence known by the prosecution to be false. The police and the prosecution have an investigative advantage which cannot be matched by any private individual. They have the authority to question, search and investigate. All law-abiding citizens will naturally cooperate with the police in an investigation into a crime such as a murder. It is the duty of the police, a duty they must perform with unswerving fairness, to search for the truth, not merely a conviction. From time to time the truth will not be discovered, due to the unavoidable frailty of human

beings. In such instances injustices will inadvertently occur.

But, such injustices must not be allowed to occur because the police and the prosecution are more interested in obtaining a conviction, any conviction, than in discovering the truth. Here the police soon became aware of one "Slick," who was known to several persons interviewed by the police. Being unable to find the real "Slick," the police and the prosecution set out falsely to identify petitioner as "Slick." Not only did they falsely so identify petitioner, they concealed from petitioner and his attorneys evidence which they had in their possession and control which would have shown that petitioner was not in fact that person.

The Court below based its conclusion that this suppression of evidence did not violate due process because petitioner has not requested them prior to or during the trial! Aside from the fact that this is at least partially false, the argument itself is indeed specious. How could petitioner request evidence of which he was not aware? A criminal trial, particularly one involving a possible death penalty, is not a sporting event, to be determined by the side which is best able to ferret out evidence most favorable to it and conceal that which is unfavorable. If this is in fact the manner in which a criminal trial is to be conducted, the defendant is bound to lose. The police and prosecution, clothed with the power and majesty of the law, are able to assign as many men and other resources as are necessary to investigate the crime. The defendant, especially in a case such as this where he is almost certainly innocent, is unable to do so both before and after his arrest. Before, because he is not even aware that there is an investigation in process or that he need obtain any information and

evidence. And after, because he is almost certainly incarcerated without the opportunity to make bond.

The police and a prosecutor are sworn to uphold the law and enforce justice. Every time they conceal evidence and suggest, however subtly, to a witness that something is a fact which is not a fact, they undermine the very foundation upon which our society is based. The duty of a prosecutor is to seek justice, not merely to secure convictions. He must have an absolute duty to disclose to the defense any and all evidence in his possession which is or may be favorable to the accused.

This Court should take this case to make clear, once again that such deviousness as shown by the prosecution in this case will not be tolerated. This cannot be emphasized too often.

CONCLUSION

We join in petitioner's request for certiorari. Only by such a grant will the integrity of our system of criminal justice be upheld. We ask that at least certiorari be granted on the penalty issue. The Court below has so far departed from *Witherspoon* that we ask for summary reversal as to penalty.

Respectfully submitted,

ELMER GERTZ
120 South LaSalle Street
Chicago, Illinois 60603

WILLARD J. LASSERS
11 South LaSalle Street
Chicago, Illinois 60603

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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No. 69-5001

IN THE

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OCTOBER TERM, 1969

MISC. [redacted]

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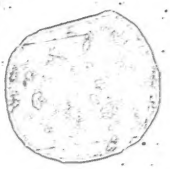
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JAMES R. THOMPSON,
JOEL M. FLAUM,
JAMES B. ZAGEL,
Assistant Attorneys General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601 (346-2000),
Attorneys for Respondent.

ROGER C. NAUERT,
Assistant Attorney General,
Of Counsel.



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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 42 Ill. 2d 73, 246 N.E. 2d 299.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether there was an unconstitutional concealment of evidence by the State.

Whether the cross examination of identifying witnesses was unduly restricted where the attempted cross examination went beyond the examination in chief and where defense counsel failed to call the witnesses as his own.

Whether the defendant was denied due process of law by the admission into evidence of a sawed-off sixteen gauge shot gun when introduced to show the circumstances of the arrest, the existence of a gun suitable for the commission of the crime, and the defendant's modus operandi.

Whether the defendant was denied his right to a trial by a fair and impartial jury where the court and the prosecutor showed a sincere desire to determine the jurors' qualifications according to *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) and where the State had sufficient peremptory challenges to have eliminated those prosepective jurors eligible to serve under *Witherspoon.*

Whether the execution of the death sentence constitutes cruel and unusual punishment.

STATEMENT OF FACTS

On April 25, 1962, at approximately 10:00 p.m., Lyman Moore and a companion were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. Moore began using profane language and, as a consequence, Zitek forcibly removed him from the premises. Present at this time were Patricia Hill, a waitress, and approximately

seven other customers. The defendant was positively identified by Mrs. Hill as the ejected patron (Abst. 25; R. 475). One hour later the defendant returned to the tavern with a shotgun. He approached the bar, aimed the gun at Zitek and fired. The blast struck Zitek in the chest, killing him. As Moore fired the shot he was again observed by Patricia Hill who later positively identified him as the murderer (Abst. 26; R. 484). He was also identified by another eyewitness, Henley Powell (Abst. 32; R. 525-526). The lighting conditions of the bar were good, and Mrs. Hill was only six feet from the defendant (Abst. 26; R. 48).

After firing the fatal shot, Moore fled the premises, pursued by Henley Powell. Powell's pursuit ended when he was warned by Moore not to come any further or he too would be shot (R. 529).

Two days later, at a different tavern known as the Ponderosa Tap, a man known as "Slick" bragged to one Virgle Sanders that he had shot a bartender in Lansing (Abst. 351). Sanders identified that defendant as "Slick." Two other witnesses identified the defendant as the man with Sanders at the tavern.

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile shot at him and then fled from the car (Abst. 57; R. 623-624). The defendant and another man were arrested some time later as they were attempting to enter the car (Abst. 78; R. 682). A sixteen gauge shotgun, which was introduced into evidence, was found in the back seat of the car (Abst. 60; R. 630). The defendant and his companion were taken to a police district station. Later, the defendant was placed in a lineup at which time he was observed by Patricia Hill, the waitress at Zitek's tavern. Mrs. Hill identified the defendant as Zitek's slayer.

Moore's defense was that he was not the man who did the killing and he produced several witnesses to that effect (Abst. 96; 106; R. 745, 765).

The jury found the defendant guilty, and fixed the penalty at death (Abst. 218; R. 1003). In a hearing on aggravation and mitigation the defendant's efforts to reduce his penalty failed because of, inter alia, his five prior felony convictions (R. 1010-1012):

(1) 1946, larceny, one to five years;

(2) 1949, larceny, one to ten years;

(3) 1957, bank robbery, seven years;

(4) 1957, Dyer Act, two years;

(5) 1962, armed robbery, twenty to forty years.

The sentence of the court was death (Abst. 220; R. 1017).

At the post conviction hearing it was discovered that Sanders had given a statement to the Lansing police in which he said that he had met the defendant six months prior to the conversation at the Ponderosa Tap. Sanders could not have met the defendant when he said he did because Moore was serving a federal prison term at the time (Abst. 354). Moreover, one William Thompson, who was acquainted with a local resident named "Slick," told the police that Lyman Moore did not resemble the man known to him as "Slick" (Abst. 255, 267, 273, 278). A bartender who also knew "Slick" told the police that he could identify "Slick" but was never called for that purpose (Abst. 254, 255). These facts were not known to the defense at the time of trial. There was no showing that the State's Attorney had these facts in his possession (Abst. 320; R.P.C. 204), and the defense never asked for these facts

(R.P.C. 347). The entire State's Attorney's file was shown to the defense at the trial (Abst. 318; R.P.C. 201).

Henley Powell testified at the trial that at the time of the crime he was sitting facing west (Abst. 32; R. 526). Officer Koppitz testified that a sketch he made showed Mr. Powell sitting in a northeast direction (Abst. 340; R.P.C. 269), but also stated that it didn't matter because all of the people sitting at the table had an excellent view of the entire crime (Abst. 340; R.P.C. 269). At the trial, the defense never requested any information from officer Koppitz when he testified.

The trial judge ruled that the defense had failed to meet its burden of proof and had not shown any suppression of evidence or any use of false testimony (R.P.C. 379-381).

On appeal the conviction and the denial of post-conviction relief were affirmed by the Illinois Supreme Court.

I.

THERE WAS NO UNCONSTITUTIONAL CONCEALMENT OF EVIDENCE BY THE STATE.

The defense here contends that there was an unconstitutional concealment of six items of exonerating evidence at trial. The facts allegedly concealed are as follows:

1. Virgle Sanders gave a written statement to the Lansing Police which stated that he first met the man known as "Slick" in Wanda and Del's tavern about six months prior to the murder, a time when the defendant was serving a federal prison sentence.

2. Delbert Jones, the owner of Wanda and Del's told the police that he could identify "Slick" but was never called for that purpose.

3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprehended and photographed.

4. William Thompson, who was acquainted with a man named "Slick" failed to identify the defendant as that man.

5. After the passage of twenty-five months Virgle Sanders saw Lyman Moore at trial and observed that the man he knew as "Slick" was 30 or 40 pounds heavier than the defendant.

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have shown that Henley Powell was seated with his back to the entrance through which the defendant passed.

Undoubtedly, any individual circumstance or set of circumstances which exculpate or tend to diminish the quality and weight of the prosecution's case can be said

to be relevant and can not be knowingly withheld from the defense. However, broad generalizations on criminal discovery are of little aid in delineating the dimensions of due process in any particular case. It is imperative to keep in the mind this Court's mandate in this regard:

> "We now *hold* that the suppression by the *prosecution* of evidence favorable to the accused upon *request* violates due process where the evidence is *material* . . ." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). (Emphasis added.)

It is against the above standard that the prosecution's conduct in the instant case must be measured.

The record produced below indicates that the Assistant State's Attorney at trial displayed his entire file to the defense. (Abst. 318-319; R.P.C. 201). Thus any information which the petitioner now claims material was not in the direct possession of the prosecutor at trial. Since there is no claim of knowing suppression by the prosecutor of any evidence, the issue devolves to whether it is the obligation of a prosecuting attorney to ferret out every conceivable piece of potentially impeaching evidence that may be contained in police files. The promulgation of such a rule is neither realistic nor necessary for the fundamental fairness due every defendant. A major murder investigation may involve scores of fruitless leads. The search for the phantom "Slick" in the present case is but an example. It is singularly naive and unfair to impose upon prosecutors the responsibility to interrogate police officers in an effort to elicit facts which when viewed in hindsight might have a favorable bearing on the conduct of the defense.

Unquestionably no prosecutor may engage in knowing suppression of evidence. However, the Constitution and

the proper administration of criminal justice demand of the prosecution good faith and a quest for truth. They do not require an inquiry into all the areas of police investigation with an eye toward preventing possible inadvertant and immaterial omissions.

Admittedly police misconduct resulting in the suppression of material evidence even without the prosecutor's knowledge cannot be condoned. This, however, has not been shown to be the case here. Moreover, a state post-conviction proceeding, designed for just such a inquiry, produced no contrary conclusion.

It is submitted that there must be a showing of intent or knowledge before an unconstitutional suppression takes place. The underlying standard of conduct at trial must be fundamental fairness: Defendants cannot hope to obtain reversals upon subsequent findings of minutiae in police files. Virtually every investigatory file will contain some fragmentary evidence which may cast doubt on the perceptive abilities of witnesses. Very often such files will also reveal the existence of persons who may have been suspected of involvement at one time. But in the course of investigation facts are uncovered which absolve some parties and further implicate others. In the gradual shift from investigation to accusation the focus of guilt sharpens to include only the very few. In some cases the sifting process rejects all but one. Here, the overwhelming evidence established Lyman Moore as that person.

When the decision is made to prosecute, the State's Attorney must rely on the integrity of the police. He expects to receive all relevant evidence: both inculpatory and exculpatory. Occasionally it will happen that minor items of evidence will not be turned over simply beeause the police view them as immaterial. Neither common sense nor the Constitution require a complete and detailed ac-

counting of all police work on a case. The defense has no right to such information and has cited no case to substantiate such a claim.

Particular emphasis has been laid on the fact that Virgle Sanders, unknown to defense counsel, informed the Lansing Police that he had first met the defendant about six months prior to the murder. Sanders was, of course, demonstrably in error since Lyman Moore was serving a federal prison term at the time. Defense counsel claims that this is highly impeaching and exculpatory. The State cannot agree. At the worst, it simply shows that Virgle Sanders, like many people, is not adept at estimating time. The period of six months was only a guess. At the post conviction hearing defense counsel called Virgle Sanders' attention to the incident at the Ponderosa Tap two days after the murder. Sanders had testified at trial that Lyman Moore was present at the tavern and that they had a conversation (R. 578-579) in the course of which the defendant said that it was "open season on bartenders" (R. 583) and that he had shot one in Lansing (R. 587). In laying the foundation for Sanders' relationship with Moore, the prosecutor asked Sanders whether he had known the defendant before that day. Sanders replied that he had, but that he couldn't estimate how long he had known Moore (R. 580). At the post conviction hearing, defense counsel asked Virgle Sanders whether he had given the Lansing Police a signed statement that he had met Lyman Moore six months prior to the incident at the Ponderosa Tap. Sanders, who has a fourth grade education, said that he could not read the long hand statement (he can only read printed words) and that the six month period was only a "rough guess" (R.P.C. 124). In answer to further questioning, Sanders said, ". . . it could have been

from two, three months to nine months. I don't know" (R.P.C. 125).

A second source of contention springing from Sanders' comments to the Lansing Police entails a confusion of identities between the defendant and a man named "Slick." At the post conviction hearing, Sanders admitted that the person whom he knew as Slick, and that he had met several months earlier, wore his hair differently (R.P.C. 134), was heavier and did not wear glasses (R.P.C. 130). Sanders, in answer to a leading question, said that if Lyman Moore was in prison at the time he first met "Slick," it would have been impossible for Lyman Moore and Slick to have been the same person (R.P.C. 132-133).

Notwithstanding this confusion of identities, it is the State's view that Virgle Sanders' murky recollections of a man named Slick are irrelevant to his positive identification of Lyman Moore as the man he knew and spoke with at the Ponderosa Tap. Sanders' statements are buttressed by the testimony of two other men who saw him speak to Lyman Moore at the Ponderosa.* The first, William Joyce, was the bartender at the Ponderosa on that day (R. 552, 554-555). He testified that he served several drinks to Virgle Sanders and Lyman Moore, and observed them talking (R. 561-562, 564). Joyce also said that Moore asked him for a ride (R. 562). Joyce accomodated Moore by arranging for a ride with Robert Fair, the owner of the tavern and the second man to observe Lyman Moore speaking with Virgle Sanders (R. 562, 564, 600-602). Fair drove Lyman Moore and his companion to Harvey, Illinois (R. 602-604). In the course of the automobile trip to Harvey

*It is relevant to note that neither of these two men were called as witnesses by defense counsel at the post conviction hearing.

Fair heard Moore's companion say, "Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

Thus, Virgle Sanders' confusion of identities between the defendant and the ubiquitous Slick and when he first met him, is scarcely material to the facts established. The proof that Lyman Moore and Virgle Sanders were previously acquainted when they met and spoke together at the Ponderosa is overwhelming.

The same could be said of all the State's evidence. In addition to the two eyewitnesses who saw the defendant kill the bartender, a third witness stated that he heard Moore brag about the murder. Any further question about Moore's identity is dispelled by two more witnesses who saw him speaking to Sanders at the time and place in question. The capstone is found in the off-hand admission of Moore's companion.

In affirming the defendant's conviction the Illinois Supreme Court was in total harmony with constitutional standards for criminal discovery. In order to constitute a violation of due process, favorable evidence must be suppressed by the prosecution after it has been requested by the defense. Moreover, the evidence must be *material* either to guilt or to punishment. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Certainly any of the items complained of here would not have disturbed the finding of guilt or the setting of the death penalty. The fact that two eyewitnesses successfully identified Moore as the killer has not been overcome.

Nor does the failure to produce any of the above items come within the constitutional prohibition against the knowing use of false evidence. *Miller* v. *Pate*, 386 U.S. 1 (1966). No false evidence was used against the defendant.

Virgle Sanders' incorrect estimate of when he first met the defendant is not false evidence. He spoke the truth according to the best of his recollection. A mistaken belief is not perjury. Even if Sanders' miscalculation (or any of the other items complained of) could be characterized as "false evidence," they did not play a "vital part in the case for the prosecution" as required by *Miller* v. *Pate*.

The Second Circuit has explored the various standards for reversal in cases of suppression in *United States* v. *Keogh*, 391 F. 2d 138 (2nd Cir. 1968). The court isolated three categories:

> (1) deliberate suppression in which the court includes "not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention" (pp. 146-147);
>
> (2) suppression by the prosecutor of evidence favorable to the accused upon request;
>
> (3) and "where hindsight discloses that the defense could have put the evidence to not insignificant use" (p. 147).

In the court's view the first two situations present no difficulty. The third presents a problem. The court concludes that while in some instances relief should be granted, the standard of materiality must be considerably higher than the usual level of probity required for admissibility. The State subscribes to this analysis and suggests that in this case the evidence does not reach this high level of materiality.

It has never been held that the prosecution's duty to disclose extends to all evidence possibly admissible and useful to the defense. Nor has it been established what specific degree of prejudice must be shown in order to warrant

a new trial. The cases, however, indicate that insignificant items of unproduced information will not overturn a conviction. De minimis cannot defeat due process. The evidence suppressed in *Giles* v. *Maryland*, 386 U.S. 66 (1967), is representative of the sort of withheld data which has produced reversals. In *Giles* the State suppressed evidence which would have severely discredited the prosecutrix in a rape case. The effect of the evidence would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. Thus, the effect of the evidence in *Giles* and other cases along this line of decisions has been such as would have produced an acquittal or substantial reduction in sentence. Neither of these criteria have been met in the present case. To grant a reversal in the instant case would be an invitation to every defendant to search for inconsistencies in the investigator's files long after his conviction. The impact on our present system of criminal justice can only be imagined. The Eight Circuit has pondered the implications in *Johnson* v. *Bennett*, 386 F. 2d 677, 680 (8th Cir. 1968):

> "[A]ll the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation to the rule. If convictions could be set aside years after they become final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered."

In addition to these policy considerations, there remains the simple fact that a fair trial was not denied the petitioner, and no knowing suppression of material evidence took place.

II.

THE CROSS EXAMINATION OF THE IDENTIFYING WITNESSES WAS NOT UNCONSTITUTIONALLY RESTRICTED.

The defense has contended that their cross examination of the two identifying witnesses was unduly limited by the trial judge. At the outset, it is important to note that cross examination of witnesses is a matter for the discretion of the trial court. There can be no reversal except where there has been an abuse of discretion. *People* v. *Andrews*, 327 Ill. 162, 158 N.E. 462 (1927); *Rea* v. *Missouri ex rel. Hayes*, 171 Wall. 532, 21 L. Ed. 707 (1873). In Illinois it has been frequently stated that cross examination must be strictly confined to matters touched upon during direct examination. *People* v. *Morris*, 30 Ill. 2d 406, 197 N.E. 2d 433 (1964). One of the first jurists to sponsor this rule in America was Mr. Justice Story in *Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535 (1840). The rule he enunciated was as follows:

> "[A] party has no right to cross examine any witness except as to facts and circumstances connected with the matters stated in his direct exxamination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."

The underlying reason for confining the scope of cross examination is to promote order and method in the presentation of a case. Each party must have an opportunity to present his side of the controversy without the introduction of matters unrelated to his case in chief and not touched upon in his evidence. This rule makes the issues as clear as possible to the jury by reducing to a minimum the possibility of the intermingling of matters purely de-

fensive in character with the facts of the state's case. 6 Wigmore, Evidence § 1887 (3d ed. 1940). The issues are clarified and confusion eliminated to the greatest possible extent by the separation of their respective contentions and the testimony produced in support thereof.

The law is also quite clear in Illinois that cross examination of identification witnesses is restricted to matters which explain, modify or discredit earlier testimony. *People* v. *Coli*, 2 Ill. 2d 186, 117 N.E. 2d 777 (1954).

In the instant case a waitress named Patricia Hill was called as a witness. She identified the petitioner Lyman Moore as the ejected customer who returned to Zitek's tavern to shoot the bartender (Abst. 25-26). During cross examination the defense asked Patricia Hill when the next time was that she saw the defendant after the shooting (Abst. 28; R. 492). An objection was sustained on the ground that the question went "beyond the examination in chief" (Abst. 28, 31). Defense counsel was, however, later permitted to ask this question and get an answer (Abst. 31; R. 515). Therefore, even if an error had been committed in sustaining the earlier objection it was subsequently cured. *People* v. *Morgan*, 28 Ill. 2d 55, 190 N.E. 2d 755 (1963). The defense next tried to question the witness concerning the details of two police lineups which she had attended. Objections to these questions were also sustained (Abst. 31; R. 516). On direct examination nothing had been brought out about seeing the defendant at any other time. The trial judge made his position clear when in a hearing out of the presence of the jury he said (R. 503):

> "THE COURT: You can go into identification and you can go into any statements she made to the police, with reference to her identification, but I'm not

> going to let you go into how many other times. That's what I'm telling you very frankly. You may go into any question of identification she gave to the police about this man, but I'm not going to let you ask her, how many other times has she seen the man since, when she hasn't gone into that on direct. That's what I meant. Because it isn't necessary to do that, in order for you to impeach her on identification. You don't need to impeach her by asking her how many other times she saw him. There are plenty of ways of impeaching her on identification."

Thus the position of the trial judge was clear. He was not restricting cross examination which would discredit the witness but merely foreclosing irrelevant cross examination which went beyond the scope of direct examination.

In rebuttal, Patricia Hill testified that she had gone to a lineup with one Donald O'Brien and that she had been to a lineup the night before (Abst. 144; R. 873). The defense failed to cross examine her on the point. Evidence brought out by defense questioning verified the fact that Patricia Hill had attended more than one lineup (Abst. 166; R. 790-791). Thus, the argument of the defense that they were unduly restricted is completely without merit. The defense was only prevented from bring out irrelevant matters.

The defense complains of a similar restriction on the cross examination of Henley Powell. Powell also identified the petitioner as the man who came into the tavern and shot the bartender. The defendant again claims that he was precluded from inquiring into what transpired at two Chicago police lineups; the first of which occurred on the

night of October 31, 1962, and the second on the next day, November 1, 1962 (Abst. 31, 145). The defendant ignores the fact that Henley Powell later testified that he did not attend police lineups in October or November, 1962. This fact was brought out on cross examination by the defense (Abst. 143). If the defendant was desirous of exploring any other collateral sources of identification, it behooved him to call Henley Powell as his own witness. He failed to do so.

The failure of the defendant to call Patricia Hill or Henley Powell as his own witness is made doubly damaging when one considers the witnesses that he did call. The only "witness" to the murder called by the defense was Donald O'Brien. He testified that at the time of the murder he was playing cards with his back to the door and the bar and did not see who fired the shot (Abst. 115). O'Brien also stated that Henley Powell was sitting to his right which would mean that Powell was facing northeast, i.e., toward the bar. Thus, the defense chose to bypass two witnesses who did see the fatal blast in deference to a single witness who did not.

It is clear that although a defendant has every right to cross examine the identifying witness, such right is by its very nature restricted to matters which explain, modify or discredit the earlier testimony. Since the attempted questions had no such effect, it was beyond the scope of the direct examination, immaterial, and therefore, improper.

This well known rule of procedure has not been changed by recent constitutional decisions involving the Sixth Amendment right of confrontation. See *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Douglas* v. *Alabama*, 380 U.S. 415 (1965). These cases guarantee an accused the right to confront the witnesses against him by preserving the right

to ask the witness such questions as will either discredit the witness or establish the defendant's innocence by revealing the truth. *Pointer* and *Douglas* do not say that the defense is absolved from following the rules of evidence nor immune from the more basic requirements of relevance and materiality.

The distinction between the rules of evidence on cross examination and the demands of the Sixth Amendment are apparent in *Smith* v. *Illinois*, 390 U.S. 129 (1968). There the defendant was on trial for the illegal sale of narcotics. The principal witness against him was a man who identified himself on direct examination as "James Jordan." The witness was a police informant whose name and address the prosecution wished to keep secret. The court sustained the state's objections to the disclosure of the witness's correct name and his address. The trial judge thereby precluded the defense from ever making such inquiries, either during cross examination or on direct examination as the defense's own witness. The information sought was relevant and the questions were asked at an appropriate time. Moreover, the defendant had a constitutional right to hear the answers.

In the instant case the defense most assuredly had a right to the answers they were seeking—but not on the prosecution's time and not when the questions were irrelevant to the matters touched upon during direct examination. When the opportune moment came for such questions the defense failed to ask them because they knew answers would not be helpful.

In *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a "critical stage" in the prosecution, at which the accused must be

given the opportunity to be represented by counsel. That holding does not, however, apply to the defendant's case, for the lineups in which he appeared occurred before June 12, 1967. *Stovall* v. *Denno,* 388 U.S. 293 (1968). But in declaring the rule of *Wade* and *Gilbert* to be applicable only to lineups conducted after those cases were decided, this Court recognized that, judged by the "totality of the circumstances," the conduct of identification procedures may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law. 388 U.S. 302. See *Simmons* v. *United States,* 390 U.S. 377, 383 (1968); *Foster* v. *California,* 394 U.S. 440 (1969).

The defendant seeks to place his case within the ambit of *Stovall* and the cases following. He uses the device of innuendo to suggest that the police lineups improperly induced his identification. The defendant again engages in the fiction that he was precluded from effective cross examination. It was entirely within his province to call any of the police officers or witnesses present at the lineups. Whether or not the persons in the lineups differed from him in appearance was peculiarly within his own knowledge. If any unfairness occurred at the pretrial confrontations it was easily discoverable. Instead, the defense was content not to question the regularity of the lineups until now. Again the State asserts that the defendant's claim of prejudice is erroneous. The defendant cannot obtain the benefit of his dark inferences of procedural unfairness when he failed to make use of the many opportunities afforded him and has not offered a single item of proof to substantiate his claim.

Each time that an opportunity presented itself to inquire further into the facts defendant now claims would be most favorable to his case, defense counsel turned away.

III.

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF A SAWED-OFF SIXTEEN GAUGE SHOTGUN.

The defense here claims that it was error to admit into evidence a sawed-off sixteen gauge shotgun on the premise that the deceased was killed with a twelve gauge shotgun.

It is a well established principle in Illinois and elsewhere that circumstances of the arrest may be brought before the jury. *People* v. *Wright*, 30 Ill. 2d 519, 198 N.E. 2d 316 (1964). Here the police were fired upon and saw a man fleeing from a car (Abst. 57; R. 623-624). The defendant was later arrested entering the very same car (Abst. 78; R. 682). In the back seat of the car was a loaded sixteen gauge shotgun (Abst. 61, 66; R. 630-641).

The Illinois rule is stated in *People* v. *Smith*, 413 Ill. 218, 221, 108 N.E. 2d 596 (1952), where it is said:

> "[W]eapons found in a defendant's possession or control at the time of his arrest on a murder charge may be the subject of testimony pertaining to the details of the arrest."

Thus, the shotgun was admissible purely on the ground that it was clearly in the constructive possession of those arrested on a murder charge. It was also admissible on independent grounds of relevance. The only evidence in the record as to the weapon in the crime was medical testimony that a shotgun was used. The witness, however, stated that he did not know what size shotgun was involved (Abst. 40; R. 573). The only other evidence was a stipulation that if a certain police officer were called he would

testify that in his opinion a twelve gauge shotgun was used (Abst. 139; R. 553). Hence, no conclusive proof was ever adduced to show what gauge shotgun was used to fire the fatal blast.

Illinois courts have always held that it is proper to admit into evidence any weapon found within the defendant's control suitable for the commission of the crime charged, even though there is no showing that it is the actual weapon used. Thus, in the case of *People* v. *Lenhardt*, 340 Ill. 538, 549, 173 N.E. 155 (1930), the Illinois Supreme Court said:

> "It is competent to prove that an accused person, when arrested, possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made that he actually used it in committing the particular crime."

The foundation for this rule of evidence is easily understandable. Most cases ultimately turn on the conclusions reached by the finder of fact. In many cases physical evidence is adduced which is related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Such evidence does not usurp the province of the jury, since the jury does not have to accept the witness's opinion. *Miller* v. *Pillsbury*, 33 Ill. 2d 514, 516, 211 N.E. 2d 733 (1967). Illinois courts have not abandoned the principle that such opinion evidence should be received with caution. *Thomas* v. *Cagwin*, 43 Ill. App. 2d 336, 193 N.E. 2d 233 (1963). There is always the possibility that a given expert in the field of weaponry is simply wrong in his deductions. And in this case the witness' expertise was not established in the record. It is, therefore, quite understandable why Illinois courts will permit the introduction of a weap-

on found within a suspect's control at the time of his arrest which is suitable for the commission of the crime charged, even though no claim is made that he actually used it on the occasion in question. Accordingly, in the case of *People* v. *Ostrand*, 35 Ill. 2d 520, 221 N.E. 2d 499 (1966), a "snub-nose" revolver was used in a robbery. A larger revolver was found on the defendant at the time of his arrest and admitted into evidence. It was held that such a discrepancy goes only to the weight of the evidence and not the admissibility. In the instant case there is a diminutive amount of evidence in the record to establish the size of the shotgun used in the murder. It is entirely possible that the weapon found in the defendant's possession could have been the murder weapon. There can be no doubt that the shotgun found at the time of the defendant's arrest was similar to the murder weapon and was, therefore, properly admitted into evidence.

For these reasons it is apparent that the weapon was not used against the petitioner to denounce him as a "bad man" without regard to his guilt or innocence. It is a well established rule that evidence of prior crimes cannot be introduced when it has no purpose other than to show criminal disposition. *Spencer* v. *Texas*, 385 U.S. 554 (1961). There are, however, numerous instances where evidence of prior crimes is admissible. In such cases the probative value of the evidence outweighs the possible prejudicial effect on the jury. Here, there was a distinct possibility that the shotgun in evidence was the very same gun that killed the bartender. Moreover, ready access to a loaded shotgun could be considered a part of the defendant's modus operandi.

It is clear that the "other crime," when it is found to be independently relevant and admissible, need not be estab-

lished beyond a reasonable doubt, either as to its commission or as to the defendant's connection therewith. 1 Wharton, Criminal Evidence, § 366 (11th ed. 1935). The decision as to whether the logical relevance of the gun conterbalanced any improperly damaging effect on the defendant was with the trial court. Here, the possibility that the shotgun could have been the murder weapon, plus its distinctive character tending to show a modus operandi, combine to establish a high degree of relevancy. In the instant case the trial judge clearly acted within his permissible discretion in affirmatively weighing the actual need for the admission of the shotgun in light of the issues and the evidence.

IV.

THE DEFENDANT WAS NOT DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY UNDER THE WITHERSPOON DOCTRINE.

The defendant asks that his death sentence be vacated upon the authority of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). In that case it was held that the exclusion of jurors simply on the ground that they had scruples against capital punishment, without further inquiry to determine whether the juror could vote to inflict a death sentence, deprives a defendant of his right to a trial by a fair and impartial jury.

During the *voir dire* in the present case each venireman was asked in substance whether he had any religious or conscientious scruples against the infliction of the death penalty in the proper case. In the context of the entire *voir dire*, including the trial court's efforts to determine whether the jurors would consider all possible verdicts, it cannot be said that there had been removed from the jury

"for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty." *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968). Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.

The general course of the examination, however, was unlike *Witherspoon* where the trial judge promptly removed all who voiced the slightest disdain for the death penalty. The effort of the trial court to select a fair and impartial jury is reflected in the examination of prospective juror Conner:

> "The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?
>
> A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.
>
> Q. In other words, you don't believe in capital punishment?
>
> A. If that's what it amounts to.
>
> Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?
>
> A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.
>
> The Court: Well, I'm not going to remove him." (R. 145).

Another example is the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjure my self about that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial." (R. 227-229)

It is the State's understanding of the *Witherspoon* doctrine that the exclusion of jurors with scruples against capital punishment does not necessarily void the infliction of the death penalty. The tenor of the *voir dire* examination here was quite different from that of the *Witherspoon* court. In that case the tone was set early in the *voir dire*

when the trial judge said, "Let's get these conscientious objectors out of the way without wasting any time on them." In this case, there was no hint of a desire to be unduly rash in selecting the jury. To the contrary, the mood of the proceedings here indicated a sincere desire to determine the jurors' qualifications. The fact that the questioning became more abbreviated as the examination progressed indicates merely an increase in efficiency, not a sellout to haste.

It is also clear that in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*. Since this was a capital case each side had 20 peremptory challenges under the applicable Illinois statute. Ill. Rev. Stat. 1963, Chap. 38, par. 115-4(e). None of the State's peremptory challenges was exercised against veniremen who were totally opposed to capital punishment. Nothwithstanding this fact the State still failed to exhaust all of its peremptory challenges at the close of the examination. If defense counsel had elected to question further and had been able to elicit from a few challenged veniremen the response that despite their religious or philosophical principles they might be able to sign a death verdict, the composition of the jury would have been no different in respect to its propensity to invoke the death penalty. The State would have used the necessary number of its peremptory challenges to excuse these vacillating veniremen lest they prevent any verdict from being reached by creating a dispute in the jury room over whether the death penalty is ever proper. It is apparent, therefore, that the *voir dire* examination in the present case conformed to *Witherspoon* standards.

V.

EXECUTION OF THE DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Amici curiae, the American Civil Liberties Union and the Illinois Committee for the Abolition of Capital Punishment, have petitioned this Court to declare that the penalty of death is cruel and unusual punishment. They announce two bases for their contention:

> (1) That the Illinois courts do not understand the *Witherspoon* doctrine, and
>
> (2) That the Illinois courts sponsor unethical prosecutions and favor the unconstitutional suppression of evidence. (A. C. Br. 3)

Following this outrageous, gratuitous, and false insult to the courts and prosecutors of Illinois, amici curiae conclude with an extraordinary exercise in anti-logic by concluding that capital punishment should be abolished.

Historically the Eighth Amendment has been used to prohibit punishment which is inherently cruel or cruelly excessive. See, for example *Rosenberg* v. *Carral*, 99 F. Supp. 630 (S.D. N.Y. 1951) and *State* v. *Evans*, 73 Idaho 50, 245 P. 2d 788 (1952). But punishment by death (at least where it does not add unnecessary suffering) has consistently been held to be outside of the Eighth Amendment prohibition. Courts have also rejected the contention that capital punishment is *per se* a denial of due process. For example, the Washington Supreme Court recently held that:

> "The Fifth Amendment refers specifically to "capital cases," and also states . . . that a person may not be deprived of his life without due process. The Fifth Amendment also provides that a person may not be twice put in jeopardy of his life. Implicit in these are their corollaries—that the State may deprive an individual of his life if the proceedings are in accord with the requirements of due process and may place him in jeopardy once for a given offense. Certainly, if the state can call upon the most responsible and law abiding of its young men to sacrifice their lives in battle, it has the power, under the constitution, to execute one who, in a proceeding in which the requirements of due process have been strictly observed, has been found by a jury of his peers to have committed a crime so heinous that, in its opinion, his life should be exacted as a penalty. *State* v. *Smith*, 446 P. 2d 571, 589 (Wash. 1968).

It is unnecessary to further explore the numerous lower court cases across the country which have held squarely against the views expressed by the petitioners. Their arguments were disposed of in *Trop* v. *Dulles*, 356 U.S. 86, 99 (1958) when this Court held that "the death penalty has been employed throughout our history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." Mr. Justice Brennan, in a concurring opinion, observed that among the several purposes of the criminal law is the deterrence of a wrongful act "by the threat of punishment and isolation of society from dangerous individuals by imprisonment or execution." 356 U.S. 86, Ill. Moreover, *Witherspoon* v. *Illinois*, *supra*, unmistakably assumes that a sentence of death is a constitutionably permissible punishment for the crime of murder.

Although deterrence is a questionable by-product of capital punishment in most homicides, it certainly must have

some impact on those who would contemplate a murder as ruthless as that committed by Lyman Moore. A shotgun execution after an hour's deliberation is hardly the sort of hot blooded crime that is arguably undeterable. Even if it were, it is not the province of the courts to eradicate the form of punishment chosen by the populace and reserved for the most reprehensible to walk among us. The defendant must surely be counted in this number.

CONCLUSION

For the foregoing reasons the Respondent requests that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
JAMES R. THOMPSON,
JOEL M. FLAUM,
JAMES B. ZAGEL,
Assistant Attorneys General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601 (346-2000),
Attorneys for Respondent.

ROGER C. NAUERT,
Assistant Attorney General,
Of Counsel.